

February 8, 2001

Mr. Robert J. Davis  
Matthews, Carlton, Stein, Shiels, Pearce, Dunn & Knott, L.L.P.  
8131 LBJ Freeway, Suite 700  
Dallas, Texas 75251

OR2001-0492

Dear Mr. Davis:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 144042.

The City of Mabank (the “city”), which you represent, received a request for information relating to a particular city police officer. You claim that some of the requested information is excepted from disclosure under sections 552.102, 552.103, and 552.117 of the Government Code. We have considered the exceptions you raise and have reviewed the responsive information you submitted. We assume that the rest of the requested information has been released. *See* Gov’t Code §§ 552.006, .301, 302.

As section 552.103 of the Government Code is the most inclusive exception you raise, we address it first. Section 552.103, the “litigation exception,” provides in relevant part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To sustain this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date that the governmental body received the written request for information and (2) the requested information is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be established in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, the governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

In this instance, you explain that the requestor is the mother of an individual who died in an accident involving the officer to whom the requested information pertains. You also represent to this office that the requestor “has taken concrete steps toward litigation by stating that she will be making a claim against the City.” However, you do not provide this office with any documentation of such a threat to sue the city, nor do you inform us of any other concrete basis for the city’s belief that a lawsuit by the requestor may be imminent. Therefore, having carefully considered your arguments, we find that the city has not demonstrated that the information in question relates to litigation that the city reasonably anticipated on the date of its receipt of the request for that information. Therefore, the city may not withhold the requested information under section 552.103. *See* Gov’t Code § 552.103(c); Open Records Decision Nos. 452 at 5 (1986) (requestor’s public threats of intent to sue do not alone trigger statutory predecessor to section 552.103), 331 at 1-2 (1982) (mere threats of litigation do not suffice to substantiate claim under statutory predecessor).

Section 552.102 of the Government Code excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]” Gov’t Code § 552.102(a). The privacy that section 552.102(a) affords to personnel records corresponds to the protection that section 552.101 provides in

conjunction with the common law right to privacy. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information must be withheld under section 552.101 in conjunction with common law privacy when (1) it is highly intimate and embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Industrial Found.*, 540 S.W.2d at 685. Employee privacy under section 552.102(a) is narrower than common law privacy under section 552.101, however, because of the greater legitimate public interest in matters involving public employees. See *Hubert v. Harte-Hanks Tex. Newspapers, Inc.*, 652 S.W.2d 546, 549-51 (Tex. App.--Austin 1983, writ ref'd n.r.e.); Open Records Decision Nos. 473 at 3 (1987), 444 at 3-4 (1986), 423 at 2 (1984). Generally, section 552.102(a) protects employee information from disclosure only when the information in question reveals "intimate details of a highly personal nature." See Open Records Decision No. 423 at 2 (1984). Upon careful examination of the submitted information, we conclude that none of that information is excepted from disclosure under section 552.102.

We note, however, that the submitted records include information that is confidential under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Criminal history record information ("CHRI") obtained from the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") must be withheld under section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code. The dissemination of CHRI that was obtained from the NCIC network is governed by federal law. Federal regulations prohibit the release to the general public of CHRI that is maintained in state and local CHRI systems. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for which it was given") and (c)(2) ("No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself"); see also Open Records Decision No. 565 at 10-12 (1990). The federal regulations allow each state to follow its own individual law with respect to CHRI that it generates. See ORD 565 at 10-12. Sections 411.083(b)(1) and 411.089(a) of the Government Code authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. See Gov't Code § 411.089(b). Thus, any CHRI generated by the federal government or another state may be disclosed only in accordance with the federal regulations. Furthermore, any CHRI obtained from the Texas Department of Public Safety (the "DPS") or any other criminal justice agency must be withheld as provided by subchapter F of chapter 411 of the Government Code.<sup>1</sup> We have marked information that the city must withhold under

---

<sup>1</sup>We note that "criminal history record information," for the purposes of subchapter F of chapter 411 of the Government Code, does not include driving record information that is maintained by the Department of Public Safety under subchapter C of chapter 521 of the Transportation Code. See Gov't Code § 411.082(2).

section 552.101 in conjunction with federal law and subchapter F of chapter 411 of the Government Code.

The submitted records also contain criminal history information that is confidential under section 552.101 of the Government Code in conjunction with the common law right to privacy. Common law privacy protects private facts about individuals. *See Industrial Found.*, 540 S.W.2d at 685. When a law enforcement agency compiles criminal history information pertaining to a particular individual, the compiled information takes on a character that implicates the individual's right of privacy in a manner that the same information in an uncompiled state does not. *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *see also* Open Records Decision No. 616 at 2-3 (1993). We have marked the criminal history information that the city must withhold under section 552.101 and *Reporters Committee*.

Additionally, the submitted records contain information relating to the identities of juvenile offenders. That information, which we have marked, also is confidential under section 552.101 in conjunction with common law privacy.

The submitted information also includes medical records, the disclosure of which is governed by the Medical Practice Act, as codified at subtitle B of title 3 of the Occupations Code. *See* Occ. Code § 151.001. Section 159.002 of the Occupations Code provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(b), (c). The Medical Practice Act includes provisions that govern the disclosure of information that it encompasses. *See* Occ. Code §§ 159.003, .004, .005, .006. This office has determined that in governing access to a specific subset of information, the Medical Practice Act prevails over the more general provisions of the Public Information Act.<sup>2</sup> Therefore, the medical records that we have marked may be released only if and as permitted by the Medical Practice Act.

---

<sup>2</sup>*See* Open Records Decision No. 598 (1991). The Seventy-sixth Legislature repealed the predecessor statute, article 4495b of Vernon's Texas Civil Statutes, in enacting the Occupations Code. *See* Act of May 13, 1999, 76<sup>th</sup> Leg., R.S., ch. 388, §§ 6, 7, 1999 Tex. Gen. Laws 1431, 2439-40. The legislation was a non-substantive codification.

Section 552.117 of the Government Code excepts from disclosure the home address, home telephone number, and social security number of a peace officer, and information that reveals whether a peace officer has family members, regardless of whether the peace officer complies with section 552.024. *See* Gov't Code § 552.117(2). We have marked the types of information that the city must withhold under section 552.117(2).

Lastly, section 552.130 of the Government Code excepts from disclosure information relating to motor vehicle records, including "a motor vehicle operator's or driver's license or permit issued by an agency of this state[.]" Gov't Code § 552.130(a)(1). We have marked information that the city must withhold in accordance with section 552.130.

In summary, none of the submitted information is excepted from disclosure under sections 552.102 or 552.103 of the Government Code. However, criminal history record information is confidential and must be withheld under section 552.101 of the Government Code in conjunction with federal law and subchapter F of chapter 411 of the Government Code, and other submitted information must be withheld under section 552.101 in conjunction with common law privacy. The responsive medical records are governed by the Medical Practice Act. The submitted records also contain information that the city must withhold under sections 552.117(2) and 552.130. The remaining information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body

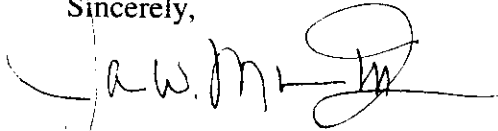
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.W. Morris, III', with a stylized flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/seg

Ref: ID# 144042

Encl: Submitted documents

cc: Ms. Judi Brown  
P.O. Box 1564  
Mabank, Texas 75147  
(w/o enclosures)